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IN THE

Supreme Court of the United States

No. 73-356

Supreme Court, U. S.
FILED
AUG 27 1973
MICHAEL RODAK, JR., CLERK

RENATO RIVA,

Petitioner,

-against-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

RENATO RIVA,
Petitioner,

-against-

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Third Circuit, entered in the above cause on April 13, 1973, and the Order of said Court denying the petition for rehearing, entered June 1, 1973. No opinion was written by the Court.

DECISION BELOW

FIRST: The judgment of the United States Court of Appeals for the Third Circuit is contained in the Appendix, as is the order of said Court denying rehearing.

SECOND: The order sought to be reviewed was entered on October 6, 1970 by a Special Inquiry Officer of the Immigration and Naturalization Service, and was affirmed by the Board of Immigration Appeals on June 16, 1972.

This decision was affirmed by the Court of Appeals on April 13, 1973; order denying petition for rehearing was entered June 1, 1973.

Jurisdiction to review in the matter sought herein is conferred upon this Court by 28 U.S.C. Section 1254(1).

THIRD: Questions presented for review are as follows:

(a) Where a permanent resident alien departs from the United States and relinquishes his immigrant status to acquire a lawful nonimmigrant status which nonimmigrant status places him in a category exempt from the draft, after seeking the advice of, and consulting with appropriate government officials at each state who never warned him that he might be barred from returning as a person who left the United States to avoid military service, is the government estopped from asserting that he voluntarily relinquished his immigrant status and from asserting that he is barred from ever regaining such status.

(b) Where the Court of Appeals, without opinion, affirms the decision of a federal administrative agency on a basis different than that of the administrative agency, whether the Court of Appeals is obligated to write an opinion so that in petitioning the Supreme Court for a Writ of Certiorari, the petitioner is fully cognizant of the grounds of the lower court action.

FOURTH: The statutory section which the case involves is as follows: Immigration and Nationality Act 66 Stat. 163 (1952), as amended: Section 212(a)(22), 8 U.S.C. 1182(a)(22).

STATEMENT OF THE CASE

FIFTH: The petitioner was born in Peru in 1941. He first came to the United States in 1956, and departed soon thereafter, reentering several times in nonimmigrant categories as a student and as a visitor. In 1964, while in the United States, he became engaged to a native born United States citizen. In 1965, he entered as a visitor in order to marry and was married on August 8, 1965. His wife was unable to leave the United States with him at that time, although he planned to depart with her for Peru in June, 1966 to commence work in his family business. In order to work in the United States until his wife was prepared to depart, he applied to become a permanent resident of the United States and on November 29, 1965, became a permanent resident. In July, 1966, received a notice of induction into the military. Since, at that time, he did not plan to remain in the United States for an extended period of time, he sought advice as to how he could best place himself in a status exempt from military service.

He inquired of the Selective Service System, and was advised at first that he could apply for an exemption under Section 315 of the Immigration and Nationality Act, 8 U.S.C. 1426 and, subsequently, that he was not eligible for Section 315 relief. He then sought the advice of the Immigration and Naturalization Service, and discussed his situation with the Officer before whom he had appeared prior to becoming a permanent resident. He was advised by this officer that by going abroad, surrendering his immigrant status, and

acquiring nonimmigrant status, he would thereby place himself in a draft exempt category. Following this advice, he departed for Peru. Because of the importance of his actions, on August 8, 1965, Petitioner consulted with the American Vice Consul in Lima, Peru who was aware of all of the facts surrounding his background and of his American citizen wife and home in the United States, to confirm the advice of the immigration officer. The Vice Consul indicated that the advice was correct and that it would be advisable for petitioner to relinquish his permanent residence by writing a letter to the Immigration and Naturalization Service in the United States enclosing his alien registration card, and that such procedure would lawfully exempt him from military service. It was understood at this meeting that petitioner planned to return immediately to his United States citizen wife who remained in the United States during this period.

At no time was petitioner advised by any of the Governmental officials who counseled him that the recommended course of conduct would, or might result in any penalty or forfeiture.

Petitioner returned to the United States on August 30, 1966 as a visitor. After his entry, he applied for a further extension of his stay which was denied. On February 11, 1967, he departed from the United States and presented himself to the American Consulate in Peru who issued him an I-type visa as the representative of a foreign information media. He entered on February 18, 1967, and was permitted to remain until September 20, 1967. On November 14, 1967, deportation

proceedings were instituted. This culminated in a grant of voluntary departure, which was extended to allow him to complete processing of a *permanent resident* visa by mail with the American Consulate in Lima, Peru, which was fully aware of all aspects of his case.

Although he supplied facts concerning the draft and although the Consul was fully aware of all aspects of the case, he received notice from the Consular office that his papers were in order and that he was invited to appear to make formal application for an immigrant visa.

Petitioner departed from the United States for Peru on May 25, 1968. When he was not issued an immigrant visa immediately, after explaining that he had to return to take his school's final examination in two weeks, the Consul issued him a student visa.

On his arrival in May 1968, when he attempted to enter with his student visa, he was referred to a Special Inquiry Officer for a hearing in exclusion proceedings.

On January 27, 1969, a Special Inquiry Officer found him inadmissible under Section 212 (a)(22), 8 U.S.C. 1182(a)(22) which prohibits the admission of "persons who have departed from or have remained outside the United States to avoid or evade training or service in the Armed Forces in time of war or in a period declared by the President to be a national emergency...." but directed that he be admitted temporarily as a student with a grant of waiver of inadmissibility pursuant

to Section 212(d)(3), 8 U.S.C. 1182(d)(3). The decision of the Special Inquiry Officer that he was excludable under Section 212(a)(22) was affirmed by the Board of Immigration Appeals, The United States District Court for the District of New Jersey refused to grant declaratory relief, and the Court of Appeals for the Third Circuit affirmed, holding that petitioner's departure from the United States in order to return in draft exempt alien status made him permanently inadmissible to the United States as an alien who departed from the United States to evade military service. *Riva v. Mitchell,* 460 F2d 1121 (3rd Cir. 1972); *cert denied, sub nom Riva v. Kleindienst,* 93 S. Ct. 1898 (April 16, 1973).

The present deportation proceeding charges that appellant was admitted as a student and thereafter remained longer than authorized, when he completed his education, and failed to depart from the United States. On October 6, 1970, a Special Inquiry Officer, found him deportable from the United States. An appeal from this decision to the Board of Immigration Appeals was dismissed by decision dated June 16, 1972. The Court of Appeals for the Third Circuit affirmed the decision of the Board of Immigration Appeals on April 13, 1973.

The decision of the Board of Immigration Appeals indicates that the Board held that it was precluded from considering the contentions raised by the petitioner since these issues were finally adjudicated in the case of *Riva v. Mitchell* (Appendix P. 12) which decision operated as collateral estoppel in the instant case. The Court of Appeals in affirming the order of

the Board stated in summary fashion that "After reviewing petitioner Riva's contentions — we conclude that the contentions are without merit". The issue of collateral estoppel was not one of the petitioner's contentions enumerated by the Court.

The petitioner's basic contentions are as follows: (a) Petitioner did not knowingly and intentionally relinquish his permanent residence with full knowledge of the consequences thereof since the Government officials with whom he consulted did not apprise him of the consequences of his action and, therefore, was in fact, a returning lawful permanent resident alien (b) The Government is equitably estopped to claim that petitioner forfeited his permanent resident status when such forfeiture was motivated by the advice of Government officials with no warning of the consequences of that advice. (c) When the Court of Appeals affirmed the order of the Board of Immigration Appeals, it had the obligation to set forth the reasons for its action where on the surface they differ with the grounds of the Board, so that the appellant is fully apprised of the grounds of the decision and can meaningfuly meaningfully petition for a Writ of Certiorari.

BASIS FOR FEDERAL JURISDICTION

SIXTH: The federal statute which formed the basis for the deportation proceeding was the Immigration and Nationality Act, 66 Stat., 163 (1952), as amended, 8 U.S.C. 1101 *et seq.*: Jurisdiction was vested in the United States Court of Appeals for the Third Circuit by virtue of 8 U.S.C. 1105(a).

REASONS FOR ALLOWING THE WRIT

SEVENTH:

A. ***The issues presented by the instant petition are of great significance and should be determined by this Court.***

The petition raises issues which go to the very essence of the interrelation between Government and those subject to its jurisdiction and laws and to the obligation of the Government not to give erroneous or potentially harmful advice to individuals without fully apprising them of the consequences thereof.

Where a person affirmatively seeks the advice and counsel of government officials charged with implementing and enforcing a complicated field of law, he is entitled to rely on that advice and, more significantly, the Government should not be permitted to penalize him later for following the erroneous or incomplete advice given to him.

Aliens are in a particularly vulnerable position requiring even greater fairness. They are unfamiliar with the United States, its laws pertaining to immigration and, consequently, tend to rely upon what they regard as the opinion of an expert. In their opinion, there is no greater expert than the government official.

With regard to the second primary contention, whether or not appellate courts are obligated to set forth the basis of a decision when it differs from that of the administrative agency, it is of great significance to any person in any area of federal administrative practice wishing to petition for a writ of certiorari.

The decision of the Court of Appeals would place his American schoolteacher wife in the dilemma of choosing between abandoning her country or her husband. The giving of erroneous advice by government officials has similar impact on thousands of human lives and requires examination of such effects in this case.

B. *The Decision of the Court of Appeals The Fact That Petitioner Did Not Knowingly And Intentionally Relinquish His Permanent Residence.*

When the petitioner received his military induction notice in 1966, he was a lawful permanent resident of the United States with an American citizen wife, and a home in Toms River, New Jersey. The record shows that he sought only to place himself, *lawfully,* into a draft exempt category, and for this purpose sought the advice of officials in three Government agenices. He was advised by such officials, that he might obtain a draft exempt nonimmigrant status by first departing the United States, and then exchanging his immigrant status for a nonimmigrant visa. He was subsequently advised by an American Consular Officer in Lima, Peru that he could relinquish his permanent resident status and return to the United States with whatever other status he had, and that such course of conduct would lawfully exempt him from military service. At no time was Petitioner advised that the course of conduct urged upon him would automatically trigger the sanctions of Section 212(a)(22) of the Immigration & Nationality Act, 8 U.S.C. 1182(a)(22), and provide a basis for the United States to exclude him *forever* as a person who "departed from ... or remained outside the United States to avoid or evade training or service in the armed forces...". Hence, petitioner, when he followed the advice given him, did

so with no knowledge or understanding of the severe penalty which would subsequently be imposed.

In *Moser v. United States*, 341 U.S. 41 71 S.Ct. 553 (1951), this Court, in interpreting Section 3(a) of the Selective Training and Service Act of 1940, as amended, 50 U.S.C.App. 303 (a), 55 Stat. 845 (relevant provision now contained in Section 315 of the Immigration & Nationality Act, 8 U.S.C. 1426) held that citizenship benefits were not forfeited by a Swiss national who had executed an application for alien military exemption upon assurances that it would not extinguish his right of citizenship. The rationale of the decision was that the alien did not knowingly and intelligently waive his right to American citizenship, and because of the misleading circumstances, never had an opportunity to make an intelligent election before two diametrically opposed courses.

Significantly, at that time, the form executed to claim a military exemption contained no warning concerning the subsequent bar to naturalization. Soon after the *Moser* decision, the Selective Service Regulations were modified to include an explicit warning of the consequences of signing the request for military exemption. In *Fuchs v. Immigration & Naturalization Service*, 329 F2d 114 (1st Cir. 1964), the Court explained that the change in Selective Service Regulations came as a direct result of the ruling in *Moser* that if an alien did not have knowledge of the consequence of the exemption "he would not lose his rights", and that

"the rationale of Moser is that aliens, even if they speak English, are entitled to a full disclosure, on which to predicate a 'knowing' choice".

The instant petition raises the issue of whether the reasoning, and the spirit of the *Moser* decision should be as applicable to cases coming within Section 212(a)(22) as it is to cases coming within Section 315 of the Act. By claiming an exemption pursuant to Section 315, an alien is thereafter barred from entry into the United States, as an alien who is ineligible to citizenship—a ground of exclusion under Section 212(a)(22). Under Section 212(a)(22), an alien is similarly barred from the United States for his failure to serve in the Armed Forces. It seems highly incongruous that *Moser* and subsequent cases would stringently require full knowledge on the part of the alien that action suggested by governmental advice would forever prevent naturalization, and not require that the same kind of stringent test of full knowledge and intention be required as to aliens who elect to forfeit their permanent resident status *upon the advice of government officials* for the purpose of lawfully exempting themselves from military induction. If such knowledge is in fact required in both situations, Mr. Riva did not knowingly and intentionally relinquish his permanent residence, and should be either deemed to have been a permanent resident of the United States at the time of his last entry or be allowed to qualify for residence anew without being considered excludable under Section 212(a)(22).

The granting of the instant petition would resolve this extremely important issue.

C. *The Decision of the Court of Appeals ignores the Doctrine of Equitable Estoppel which, in proper cases, is fully applicable to the Federal Government.*

Petitioner was a lawful permanent resident of the United States, married to an American citizen. He was also a Peruvian domiciliary. In 1966, he was living with his wife and attending school with his future plans somewhat uncertain. As was the case with millions of young men of his age, Mr. Riva suddenly found himself confronted with the possibility of induction into the Armed Forces of the United States during a period of increasing American military involvement in Southeast Asia. Mr. Riva's reaction was precisely the same as that of millions of other young men of draft age during that period: he sought a legitimate and legal way of placing himself in a draft exempt category. In this regard, the record clearly shows that he consulted at least three Government officials from whom he received contradictory, and ultimately devastating advice.

Initially, Mr. Riva was informed by an Assistant Director of the Selective Service System that he might obtain exemption as an alien by signing a declaration of relief from military service; however, he was later informed by the Selective Service that he could not sign such form as a resident. He subsequently presented himself at the Immigration & Naturalization Service office at Newark, New Jersey, and discussed his situation with the officer before whom he had appeared prior to becoming a permanent resident. He explained to this officer his desire to remain a civilian, and was

advised that by going abroad he could effectuate a change in his immigration status from an immigrant to non-immigrant status which was draft exempt. Mr. Riva went to the American Embassy in Lima, Peru on August 8, 1965, and in order to confirm this advice consulted with the Vice Consul. The record indicates that the Vice Consul was aware of all of the facts surrounding Mr. Riva's background, and that he was aware that he had an American citizen wife and hom in the United States. The Vice Consul indicated it would be advisable to relinquish his permanent residence by writing a letter to the Service in Newark enclosing his alien registration card and that such procedure would exempt him from military service. Pursuant to such advice, Mr. Riva did, in fact, return his "green card", and immediately returned to his wife in the United States on a multiple entry visitor's visa which he held. In this regard, the Vice Consul had informed him that he would be able to return immediately to the United States "with whatever status you have".

While cases such as *Government of Virgin Islands v. Gordon*, 244 F. 2d 818, (3rd Cir. 1957) adhere to the olde rule insulating the Government from equitable estoppel, many recent cases have applied equitable estoppel as fully to the Government as to private parties. See, e.g., *Brandt v. Hickel*, 427 F. 2d 53 (9 Cor. 1970); *United States v. Fox Lake State Bank*, 335 F. 2d 962 (4th Cir. 1966); *Gestuvo v. District Director of the United States Immigration & Naturalization Service*, 337 F. Supp. 1093 (C.D. Cal. 1971). The General Counsel of the Immigration and Naturalization Service observes that the trend of current decisions appears to reflect

that the impulse is for fair dealing in immigration and nationality matters. Gordon, *Finality of Immigration and Nationality Determinations—Can The Government Be Estopped?* 31 U.Chi. L. Rev. 433 (1964).

Professor Davis in his treatise on Administrative Law regards the *Moser* decision, *supra,* as an example of estoppel against the Government, 2 Davis 317-02 at 501 (1958). *Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963), also cites *Moser,* 372 U.S. at 157. Certainly, if *Moser* was decided on the basis of estoppel, the instant action is virtually identical on that issue.

Petitioner submits that the circumstances of the present case would provide an excellent vehicle for the Supreme Court to resolve the conflict of opinion which surrounds the applicability of the doctrine of equitable estoppel to the Federal Government. Clearly, the petitioner herein was effectively misled to his detriment, by public officials in a manner which should compel such an estoppel against the United States, if such relief is, in fact, available. Mr. Riva was clearly induced by advice furnished to him by Government officials, to abandon his permanent residence under circumstances which the Government later asserted must *forever* bar him from access to this country. Under the cases cited above which hold the Government to the same requirement of equity and fair dealing as private individuals, the Government would clearly be estopped to deny that petitioner was a lawful permanent resident at the time of his last entry. Under the cases relied on by the Government, it would not. Clearly, therefore, there

exists a sharply defined and highly important legal issue which relates not only to this case, but to the very nature of the relationship between government and individual in a free society, and which should properly be resolved by this Court.

D. *The Court of Appeals has the obligation to set forth in an intelligible fashion the basis for its action.*

The decision of the Board of Immigration Appeals indicates that the Board was precluded from considering the issues raised by the Petitioner as a result of collateral estoppel, those issues presumably having been finally decided in the case of *Riva v. Mitchell* (Appendix p. 12).

It is contended that the same issues were not before the Court of Appeals in this expulsion proceeding as were before the Court in the prior exclusion proceeding.

The decision of the Court of Appeals states in pertinent part: "After reviewing petition Riva's contentions that (1) he was a returning lawful permanent resident alien, (2) the Government is estopped from claiming that he was not a returning permanent resident, and (3) he should have been deemed to have been issued an immigrant visa, we conclude that the contentions are without merit...". It is nowhere stated in that decision that the affirmance is based upon the ground of collateral estoppel, as was the decision of the Board of Immigration Appeals, or whether the Court disagreed with the Board as to the issue of collateral estoppel but affirmed because it found petitioner's contentions without merit on other grounds.

Normally, when administrative action cannot be upheld on the reasons the agency has assigned, the Court will not state the proper reasons and uphold it, but will remand the case to the Agency. Davis, *Administrative Law Treatise*, Volume 2, 16.14, p. 490. The reasoning for the decision of the Court of Appeals in the instant case appears on its face, to differ from that of the Board, and yet the case was not remanded to the Board, as would be the normal practice in such a case.

Petitioner has, therefore, been placed in the position of not knowing specifically upon what grounds his appeal was denied. It appears to be a most fundamental element of due process of law that a litigant should know what the grounds of denial were, in order that his right to petition for a writ of certiorari be meaningful.

It is herein contended that the Court of Appeals had the obligation in the instant case to either remand the case to the Board of Immigration Appeals for proper action, or to elaborate upon the reasons for its affirmance.

If the Courts consistently impose upon administrative agencies the duty to specifically set forth the basis for their decisions so that the applicant may be apprised of those reasons in order to appeal, and so that the Court can review those reasons, certainly nothing less should be required of the Appellate Courts so that the appellant can petition the Supreme Court. This is particularly important where, as in the instant case, the Court of Appeals apparently disagreed with the Board of Immigration Appeals.

CONCLUSION

For all of the foregoing reasons, the decision below should not be permitted to stand, and in light of the compelling equities and important legal issues involved, it should be reversed by this Court, or in the alternative, the decision below should be remanded for further amplification of the reasons for affirmance.

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APPENDICES

APPENDIX A
SUR PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1704

RENATO RIVA,

Petitioner,

v.

IMMIGRATION NATURALIZATION SERVICE,

Respondent.

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER and WEIS, JR, Circuit Judges

The petition for rehearing filed by Petitioner, Renato Riva, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing

by the court in banc, the petition for rehearing is denied.

By the Court,

s/ Arlen M. Adams
Judge

Dated: June 1, 1973

APPENDIX B
ORDER

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 72-1704

RENATO RIVA,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of Decision of Board of Immigration Appeals

Submitted Under Third Circuit Rule 12(6)
Friday, April 13, 1973

Before: ADAMS, GIBBONS and WEIS, JR., *Circuit Judges*

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JUDGMENT ORDER

After reviewing petitioner Riva's contentions that (1) he was a returning lawful permanent resident alien, (2) the government is estopped from claiming that he was not a returning permanent resident, and (3) he should have been deemed to have been issued an immigrant visa, we conclude that the contentions are without merit, and it is

ORDERED AND ADJUDGED that the Order of the Board of Immigration Appeals is hereby affirmed. Costs to be taxed to petitioner Riva.

BY THE COURT

s/ Arlen M. Adams
Circuit Judge

Attest:

s/
Clerk

Dated: April 13, 1973

APPENDIX C
DECISION OF BOARD OF IMMIGRATION APPEALS (DEPORTATION PROCEEDINGS)

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals

File: A11 239 287 - Newark June 16, 1972

In re: RENATO *RIVA*

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Austin T. Fragomen
515 Madison Avenue
New York, New York 10022

Counsel of Record:
Elmer Fried, Esquire
(Brief filed)

ON BEHALF OF I & N SERVICE:
R.A. Vielhaber
Appellate Trial Attorney

ORAL ARGUMENT; January 28, 1971

CHARGES:

ORDER: Section 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2)) — nonimmigrant student — remained longer

LODGED: None

APPLICATION: Voluntary departure

Respondent appeals from the special inquiry officer's order finding him deportable on the charge stated in the caption. The appeal will be dismissed.

The facts have been fully stated by the special inquiry officer. Briefly, in May 1968 the respondent, a 30-year-old married male, a native and citizen of Peru sought admission to the United States as a student. On June 7, 1969, the special inquiry officer found respondent inadmissible as one who had departed from the United States to avoid service in the armed forces. So that respondent might complete his education, the special inquiry officer waived the ground of inadmissibility and permitted respondent to enter temporarily as a student. On May 16, 1969, we dismissed respondent's appeal from the order of the special inquiry officer. We approved the special inquiry officer's temporary admission of the respondent.

The period for which respondent was authorized to remain expired; however, he reamined without authority. The Service placed him in expulsion proceedings; the special inquiry officer ordered him deported on October 6, 1970. It is from

the order in expulsion proceedings that respondent appeals, but he now seeks a redetermination of the Board's order of May 16, 1969 in the exclusion proceedings in which we held that the respondent had failed to establish that his departure from the United States had not been to avoid military service. We find no reason to go into this issue. It has been judicially settled adversely to respondent's contentions. The respondent sought judicial review of the Board's order in the exclusion case. On March 17, 1971, judgment was entered against him in the United States District Court for the District of New Jersey (Civil Action 291-70). On appeal, the judgment was affirmed [*Riva v. Mitchell*, No. 71-1530 3 Cir., May 16, 1971).

The issue before us in this expulsion proceedings is simply whether or not the respondent has permission to remain in the United States. It is clear that he does not. He applied for admission with a visa good for a temporary admission only. He was authorized to remain for a temporary period only. The authorization has expired. It is clear that respondent is deportable as charged.

The matter of respondent's general admissibility is one that he may take up with a consul if respondent applies for a visa.

We will give respondent an opportunity to depart voluntarily.

ORDER: The appeal is dismissed.

FURTHER ORDER: The special inquiry officer's order of deportation is withdrawn. Respondent is permitted to depart from the United States voluntarily without expense to the Government, to any country of his choice within such period of time, in any event not less than 30 days from the date of this decision or any extension beyond that time as may be granted by the District Director, and under such conditions as the District Director deems appropriate. In the event of failure so to depart, the order of deportation be reinstated and shall be executed.

Chairman

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No. 73-356

In the Supreme Court of the United States

OCTOBER TERM, 1973

RENATO RIVA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-356

RENATO RIVA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner seeks, in this attack upon an order of deportation, to relitigate an issue already finally adjudicated against him in a prior exclusion proceeding—namely, whether he should have been admitted to the United States as a permanent resident alien despite his previous departure from this country in order to avoid the draft.

The facts are set forth in full in the decision of the Special Inquiry Officer, which is reprinted in the appendix to this memorandum (*infra*, pp. 5–12). In brief, petitioner, a citizen of Peru, was denied admission to the United States in an earlier proceeding on the ground that he "departed from * * * the United

States to avoid or evade training or service in the armed forces in * * * a period declared by the President to be a national emergency" (8 U.S.C. 1182(a)(22)). He was, however, given a temporary waiver of inadmissibilty under 8 U.S.C. 1182(d)(3) and was permitted to enter as a nonimmigrant for slightly more than one month so that he could complete his college education (Pet. App. C–2).

In his appeal from the decision of the Special Inquiry Officer in that proceeding, petitioner argued that, although he had left this country with the aim of avoiding military service, the statute should not be applied to exclude him, because the means by which he sought to accomplish that purpose involved only a temporary return to his native Peru in order to relinquish his permanent resident status in this country. That issue was resolved against him by the Board of Immigration Appeals and by the courts. See *Riva* v. *Mitchell*, 460 F. 2d 1121 (C.A. 3), certiorari denied *sub nom. Riva* v. *Kleindienst*, 411 U.S. 932.

Since petitioner overstayed his temporary admission, deportation proceedings were initiated.[1] At the hearing, petitioner sought to raise again the issue of his admissibility. He argued that he had not been informed of the consequences of relinquishing his permanent resident status, that the relinquishment was therefore not knowing and intentional, and that the

[1] Petitioner was charged under 8 U.S.C. 1251(a)(2), which provides that an alien may be deported if he "is in the United States in violation of this chapter or in violation of any other law of the United States * * *."

government should be estopped to deny that he was admissible as a permanent resident at the time of his last entry. The Special Inquiry Officer rejected the argument, finding that petitioner "has taken the position at all times most useful to his self interest and with no regard to the truthfulness of that testimony," and that petitioner's "prior written statements make his present claim no better than blatant lies" (App., *infra*, p. 9).

The Board of Immigration Appeals dismissed the appeal on the ground that the issue of petitioner's admissibility as a permanent resident had been previously adjudicated and was not properly presented in the deportation proceeding (Pet. App. C–3):

> The issue before us in this expulsion proceedings is simply whether or not the respondent has permission to remain in the United States. It is clear that he does not. He applied for admission with a visa good for a temporary admission only. He was authorized to remain for a temporary period only. The authorization has expired. It is clear that respondent is deportable as charged.

The court of appeals affirmed (Pet. App. B).

The decision of the court of appeals is correct, and further review is not warranted. Petitioner litigated and lost the issue whether he was properly excluded from this country. He cannot resurrect that question in a subsequent deportation proceeding merely by presenting it in a slightly different form. The Board of Immigration Appeals correctly resolved against peti-

tioner the only issue properly presented by him—whether he had permission to remain in the United States.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.

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[2] The court of appeals' judgment order of affirmance in this case recited that the court had reviewed petitioner's three substantive contentions and had found them to be without merit (Pet. App. B–2). Petitioner seems to draw from this the inference (Pet. 7) that the court did *not* similarly review and reject his further contention that the substantive issues were properly presented in the deportation proceeding. But there is no basis for that inference. The three contentions mentioned in the order are the three presented by petitioner's principal brief in the court of appeals. There is no reason to believe that the court rejected those arguments on the merits rather than on the basis stated by the Board of Immigration Appeals.

APPENDIX

United States Department of Justice Immigration and Naturalization Service

File: All 239 287—Newark, New Jersey, October 6, 1970

IN THE MATTER OF RENATO RIVA, RESPONDENT

In Deportation Proceedings

Charges: I & N Act—Section 241(a)(2) (8 U.S.C. 1251(a)(2))—Nonimmigrant—Remained Longer—Student.

Application: Voluntary Departure or Termination of Proceedings.

In Behalf of Respondent:
Elmer Fried, Esquire
515 Madison Avenue
New York, New York

In Behalf of Service:
Thomas W. Winnerman
Trial Attorney
Newark, New Jersey

DECISION OF THE SPECIAL INQUIRY OFFICER

The respondent is a 29-year old married, male alien, a native and citizen of Peru. He last arrived in the United States in May, 1968 and sought admission to the United States as a student to complete college work toward a degree. He was referred to a Special Inquiry Officer for a hearing to determine his admis-

sibility as it was believed he was inadmissible under Section 212(a)(22) of the Immigration and Nationality Act as an alien who had departed from the United States to avoid service in the armed forces. That hearing was protracted but eventually a decision was entered by a Special Inquiry Officer on January 7, 1969 which found him inadmissible under Section 212 (a)(22) but directed that he be admitted temporarily as a student to February 15, 1969 with the grant of a waiver of inadmissibility pursuant to Section 212(d) (3), (that decision was affirmed by the Board of Immigration Appeals).

The respondent completed his education but thereafter failed to depart from the United States, and the present deportation proceedings were instituted which charges that he was admitted as a student and thereafter remained longer than authorized. In essence, the respondent does not deny the facts in the order to show cause other than to maintain that he should be considered to be a lawful returning permanent resident at the time of his last entry and not a student. As such, he says he should not be required to depart from the United States at all. I find the respondent is deportable as charged, as the respondent was not a lawful permanent resident of the United States in 1968 or 1969.

In view of the fact that the respondent will in all likelihood litigate this decision and in view of the long and complex prior immigration hearings, it would appear appropriate that a complete review of the facts in this case be set forth in this decision. The respondent was born in Peru in 1941 and first came to the United States in 1956 when he was about 15 years of age for permanent residence. He, thereafter, made many entries to the United States in various nonimmigrant categories and has spent the greater portion

of the last 14 years in the United States. After his entry as a resident in 1956 he left, according to his testimony, in 1959, which would made him about 18 years of age a significant date in view of his subsequent attitude toward the selective service system. He re-entered the United States in 1959 as a student and remained here until 1961. His next known entry was in 1964 as a visitor. At that time he apparently became engaged and in that same year he and his fiance went to Peru, her only visit to that country. She soon returned to this country, and he came back once more in 1965 again as a tourist in order to marry. He was married on August 8, 1965.

He says that his wife was unable to leave the United States with him at that time and so he became desirous of working in the United States until she could depart with him in about June, 1966. He says that he inquired and discovered that as a tourist he could not lawfully accept employment so that for this *sole* purpose he made an application under Section 245 of the Immigration and Nationality Act on November 29, 1965 to become a permanent resident of the United States. He was then required to register under the selective service law and in July, 1966 received a notice of induction. As he was desirous of avoiding this, he made inquiry as to how it could be accomplished and believing that he could achieve this result by departing from the United States, abandoning his permanent residence and then re-entering as a nonimmigrant he proceeded to do just that. He asked for and was refused permission to leave the United States by the draft board, but nevertheless left the United States on August 7, 1966. On August 8, 1966 he wrote a letter to this Service from Peru returning his alien registration card and abandoning what he considered to be only a technical per-

manent resident status in the United States. He returned to the United States next on August 30, 1966 again as a tourist but actually to continue his studies. He entered in this status, because he had in his passport an unexpired visitor's visa which he could make use of without any formal application to the American Consul for a new or different visa. After his entry, he applied for further extension of his stay which was denied and he departed from the United States on February 11, 1967.

His next entry to the United States was a week later on February 18, 1967 at which time he was admitted with a new nonimmigrant visa he had obtained in that period of time as a representative of a foreign information media. The services he performed in this capacity were extremely limited and he was never paid for any of his efforts. There is a serious question that he ever genuinely was entitled to such a status. He was permitted to remain here until September 20, 1967 and after remaining longer than authorized deportation proceedings were instituted on November 14, 1967. He was granted permission to depart voluntarily from the United States in an order entered by me on November 11, 1967 which decision was affirmed by the Board of Immigration Appeals on March 4, 1968. He actually left the United States on May 25, 1968, and upon this trip to Peru, he sought a permanent visa and immigrant status for the third time. At this point of course he was safely past the age of 26, which he had reached on April 1, 1967. Not being immediately granted an immigrant visa, because the American Consul in Peru was seriously considering the question of his inadmissibility to the United States under Section 212(a)(22), he prevailed upon that Consul to furnish him with another student visa so that he could return and complete his student degree work. He came to the United

States with that student visa and this resulted in the excluding proceeding mentioned above and the ultimate entry as a student which is the subject of these deportation proceedings.

An analysis of the voluminous record before me and of the respondent's varying testimony now leads me to the conclusion that this respondent has taken the position at all times most useful to his self-interest and with no regard to the truthfulness of that testimony. Most of the variations concern matters peculiarly known only to the respondent such as his intentions as to residence and what kind of entry to the United States he was seeking. It is, therefore, not easy to determine the truth without a careful analysis of the entire record.

It is significant to note that present counsel for the respondent was his counsel in the first deportation hearing before me which commenced on December 11, 1967. He also appeared in the exclusion proceeding before Special Inquiry Officer Taffet in 1968 and before the Board of Immigration Appeals following both of those hearings. Despite this, not until this deportation hearing did the respondent or counsel ever claim that the respondent did not intend to abandon his lawful permanent residence in the United States as he clearly did by his letter of August 8, 1966.

This novel, legal and factual theory was presented to me first at the hearing of March 12, 1970. The legal theory being presented by counsel, the respondent immediately colored his testimony to conform but unfortunately for him his prior written statements make his present claim no better than blatant lies.

One of the Exhibits in this proceeding is a hand written letter from the respondent dated March 7, 1966 in which he said he had to return to Peru that June at the end of his wife's school year. He repeated

several times in that letter that he had no plans to stay in this country any later than June of 1966 and that he only applied for permanent residence as a technical choice rather than a genuine desire to be a permanent resident, solely because he wanted to work for a period of time between 1965 and 1966 when he remained here with his wife. Then upon his return to Peru in August 1966, he reiterates the fact that his intentions were never to become a United States citizen and that he only could have stayed in this country for a short period longer as he had to return to Peru where his future lay. In the course of the present hearing before me, there is found on Page 9, Page 13, and Page 17, wherein he reiterated that he didn't intend to stay in this country, and he had no plans to remain in this country. Yet in conformity, with the legal theory offered by counsel, he had the effrontery to testify under oath that his permanent resident status acquired in 1965 was so precious to him that if he had known his departure from the United States would bar his re-entry, he might have permitted himself to be drafted.

In essence, what the respondent is now attempting to do is claim that the permanent residence he acquired in 1965 against his will and better judgment was in fact a status so dear to him that only because of misinformation did he relinquish this position. I find his present testimony to be completely self-serving, without any foundation in fact and that the respondent abandoned his residence in 1966. He had no desire to have such a residence until he was past 26 years of age, at which time, at a hearing before me on December 11, 1967, he stated that he wanted to make the United States his home if he legally could.

Counsel has submitted a trial memorandum which I deem it appropriate to discuss. Point one says that he

believes the respondent should be regarded as having entered the United States on the occasion of his last admission with a visa as a lawful permanent resident. His argument is that when the respondent went to see the American Consul in Peru early in 1968 he did so with the intention of obtaining an immigrant visa and that it should be deemed that such a visa was issued because it should have been issued. I do not believe that if he had awaited the Consulate's final determination, he would have been issued a visa as that Consulate would undoubtedly have had to reach the same conclusion as has been reached by everyone else that the respondent was inadmissible under Section 212(a)(22).

In his second point, counsel says that the respondent should in the alternative be considered as a returning lawful permanent resident, but I believe this has been answered fully by my decision herein above.

As his third and last point, counsel refers to a decision dated September 19, 1956 made by the Regional Commissioner of the Northeast Region, and says that this decision should apply to the respondent. First, I am not in agreement with that decision, second it is not a decision of the Board of Immigration Appeals, and third the facts of that case are strikingly different from the instant one.

I, now turn to the question of the only relief available to the respondent, that of voluntary departure. He could depart from the United States at his own expense if he were disposed to do so, but I do not believe that the respondent will depart within a period of time I might set in this decision. He has already commenced an action in the U. S. District Court attacking the decision entered in his last exclusion proceeding and will undoubtedly appeal the finding in this case to the Board of Immigration Appeals and

perhaps to the courts again. A person who will depart from the United States only at his own leisure when he has exhausted what he believes to be all his legal remedies, rather than just his administrative rights, is not a person who is eligible for voluntary departure as one ready and willing to depart within the time offered. I, therefore, find him ineligible for voluntary departure.

Even if the respondent were eligible for voluntary departure, I would not be disposed to grant that relief to him as a matter of discretion, because he has, after numerous entries to the United States in various nonimmigrant capacities, violated his status. This is the second time it has been necessary to place him under deportation proceedings to enforce his departure. His last entry to the United States was gained by the exercise of extraordinary discretion in his behalf yet he has failed to comply with the terms of his admission. As he now realizes he is barred from entry to the United States for permanent residence. If he were granted voluntary departure he would undoubtedly seek entry again in the guise of a nonimmigrant. His application for discretionary relief should, therefore, be denied as a matter of discretion.

He declined to name a country of deportation, and I am required by the provisions of Section 243(a) to designate Peru. The provisions of Section 243(h) were considered, but no application has been filed by the respondent.

ORDER: *It is ordered,* That the respondent be deported from the United States to Peru on the charge contained in the order to show cause.

AARON I. MALTIN,
Special Inquiry Officer.

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